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SUBJECT: CAMPAIGNS PREPARED FOR POST-ELECTION COURT BATTLES

Classified By: Ambassador John F. Tefft for reasons 1.4(b,d)

SUMMARY

11. (C) Amendments to Ukraine's presidential election law in August 2009 granted the Administrative Courts sole jurisdiction to hear election related cases. However, confusion over who currently heads the High Administrative Court means that this court's role as the final arbiter of election disputes is uncertain. Presidential front-runners are prepared to turn to the courts to address fraud and the use of administrative resources. The legal battles could be drawn out and delay second round voting or the swearing in of a new president. End Summary.

NEW ELECTION APPEAL PROCESS LAID OUT

12. (U) Changes made in August 2009 to the law on Presidential elections laid out a new appeals process for election related cases. According to the amended law, election-related appeals are now to be handled exclusively in the Administrative Court system, rather than in Civil Courts. The District Administrative Courts (DAC) are designated to hear cases related to Precinct Election Commission and District Election Commissions. The Kyiv Administrative Court of Appeals (KACA) is designated as the primary court to hear election cases related to the Central Election Commission, but DAC and KACA rulings can be appealed to the High Administrative Court (HAC). HAC decisions are final. Ukraine's Supreme Court could also try to inject itself into the process, because when the Rada changed the Presidential Election law, it failed to remove all the references in the law to the Supreme Court's former role in overseeing elections. It was a Supreme Court decision in 2004 that led to the unprecedented repeat of the second round of voting.

LEADERSHIP OF KEY COURT IN DISPUTE

13. (U) Despite the HAC's key role as the final arbiter of election related cases, the leadership of the court is in dispute. The mandate of the court's chairman Oleksandr Pasenyuk expired on December 22 without the appointment of a new head. The Constitutional Court in 2007 struck down a law enabling the National Council of Judges to appoint Administrative Court judges. A new HAC chairman can not now be appointed until the Rada passes a new law specifying where appointment authority rests and the appointment procedure. The Rada does not return from its winter break until January 19. The Law on the Judiciary states that Deputy Chairman Mykola Sirosh should serve as Acting Chairman until a new chair is appointed. Sirosh published a court order on December 23 appointing himself acting chairman pending the appointment of Pasenyuk's successor. Pasenyuk, with the backing of the Council of Administrative court judges and

much Qthe HAC's staff, claims to be the HAC acting head until he is replaced. The head of the OSCE ODHIR monitoring effort, Ambassador Heidi Talgliavini, told the Ambassador that the disarray at the HAC was one of the most potentially serious threats to the integrity of this election.

¶4. (U) On January 12 Sirosh published an official declaration and reported to the Ministry of Interior that the official stamp of the court, without which court papers are not considered legal, had been Qt and no rulings bearing its stamp would be considered legally valid. The following day, Pasenyuk contradicted Sirosh to the press gathered at his office, saying that the stamp was not lost, but was secure in his office safe and filed his own report with the Interior Ministry claiming that the stamp is still valid. Local press reports claim that Sirosh is close to PM Tymoshenko and thQ Pasenyuk is aligned with Yanukovych.

CAMPAIGNS' LEGAL TEAMS READY FOR A FIGHT

¶5. (C) Prime Minister Tymoshenko said on January 10 that she may challenge the election results in the courts. In an interview on nationwide television channel Kanal 5, she said that "if we prove that falsifications have taken place we will go to court." Tymoshenko specifically noted the recent Central Election Commission (CEC) ruling that allows disabled voters to vote at home without the need to present medical certification of their limited mobility. She accused opposition leader Yanukovych of plans to exploit home voting to falsify election results in Crimea and the Donetsk region. Tymoshenko claimed that Yanukovych is preparing for election falsification effort larger than the manipulations in 2004 that ignited the Orange Revolution. Tymoshenko Bloc MP Valeriy Pysarenko told us that the PM's campaign has three legal teams to investigate election violations and prepare for a long court battle following the vote.

¶6. (C) Yanukovych's legal team does not plan on initiating court cases over election violations, and will only turn to the courts to "defend their victory" according an Amcit legal advisor to the Yanukovych campaign. She told us that her legal team is gathering evidence of election violations by PM Tymoshenko for use, if needed, in possible court cases, but so far does not see any evidence of a "systematic effort by any candidates to falsify the election." The Yanukovych team's intention is that if Tymoshenko asks the courts to overturn election results based on a small number of "mistakes" made by Yanukovych campaign workers, that his campaign will be able to document "ten violations made by the Tymoshenko team for each one made by his." Regions MP Mykola Azarov, however, told a press conference on January 13 that Tymoshenko is using wide-spread administrative resources, vote buying, and intimidation to try to falsify the election. He said that Tymoshenko is determined to win by fraud, but that Yanukovych's campaign would not allow the courts to overturn the election results.

COURT APPEALS COULD DELAY SECOND ROUND, INAUGURATION

¶7. (C) Although the KACA and HAC are the primary venues for election related disputes, there is still room for other courts in the appeals process. Candidates can turn to local and regional civil courts for injunctions to prevent CEC or other government action while their cases are heard in the DACs, KACA, or HAC. Ukraine's lack of clear judicial rules on jurisdiction opens the door to multiple courts issuing simultaneous contradictory rulings. This scenario could paralyze the CEC and District Electoral Commissions and significantly delay the publication of election results or the swearing in of the new President, according the Yanukovych's Amcit legal advisor. (Note: DEC's have five days to certify their results, the CEC then has five days to announce final results, and then the President-elect should be sworn in within 30 days.) She said that although court

action might delay the process, she did not believe that the courts would overturn election results.

COMMENT

[18](#). (C) The leadership confusion at the High Administrative Court, in particular, will undermine the credibility of its decisions should the election end up in the courts. This could also open a legal pathway for challenging the HAC's decisions. A messy court battle could leave the eventual winner with a taint of illegitimacy, regardless of whether the election is ultimately judged free and fair.

TEFFT